Wabash College Moot Court Competition:
Fall 2021 Participant's Guide

Preliminary rounds of the Competition will be held on Saturday, October 23. Participants should report to Baxter Hall at 8:30 A.M.; room assignments will be available outside of Baxter 101. The First Round will begin at 9:00 A.M., and the Second Round will begin at 11:00 A.M. Each team, consisting of two (2) members, will argue in two rounds, once as Petitioner and once as Respondent.

To participate in this competition, you must complete the Microsoft form at this QR code:

If you have problems singing up, please contact Dr. Jeff Drury (druryj@wabash.edu).

I. THE PARTIES:

Party	*Name before Trial Court*		*Name in the Court of Appeals*	***Result in the Court of Appeals***	*Name in the Supreme Court*
United States of America (the "Government")	Prosecution	**Won**	Appellee	**Lost**	Petitioner
Blue Jones	Defendant	**Lost**	Defendant-Appellant	**Won**	Respondent

II. THE PROBLEM:

A. Together with his older brother Green Jones, Blue Jones detonated two homemade bombs at the 2013 Yellowville Marathon thus committing one of the worst domestic terrorist attacks since the 9/11 atrocities. Three people died. And hundreds more suffered horrific, life-altering injuries. Desperately trying to flee the state of Orange, the brothers also gunned down a local campus police officer in cold blood. Reports and images of their brutality flashed across the TV, computer, and smartphone screens of a terrified public — around the clock, often in real time. One could not turn on the radio either without hearing something about these stunningly sad events.

Blue eventually got caught, though Green died after a violent confrontation with the police.

A grand jury indicted Blue on multiple counts including seventeen that carried the death penalty. Blue stood trial about two years later in a federal courthouse just miles from where the bombs went off. Through his lawyers, he conceded he did everything the government alleged. But he insisted Green was the radicalizing catalyst, essentially intimidating him into acting as he had. A jury convicted Blue of all charges and recommended a death sentence on six of the seventeen death-eligible counts — a sentence the federal district judge imposed (among other sentences). Blue appealed only the death sentence to the United States Court of Appeals for the 14th Circuit. That court vacated the death sentence, and remanded case for a new jury trial limited to the penalty Blue should receive on the death-eligible counts.

The Court of Appeals based its decision on two reversible errors. First, considering the excess of potentially prejudicial pretrial publicity, the appellate court found that the district court judge erred in denying Blue's request to ask all potential jurors content-specific questions about "what they had seen, read, or heard about his case." In other words, the trial court should have asked each of the prospective jurors not just *whether* they had seen media coverage about the case, but also *what*, specifically, they had seen. Second, the district court judge abused his discretion by excluding potentially mitigating evidence – information about Green's alleged participation in a 2011 triple homicide in Taupeville, Orange – at the penalty phase of Blue's trial.

The United States Supreme Court has granted the Government's petition for certiorari and set the case for oral argument.

B. The case is to be decided on the merits. The issues as stated in the petition for certiorari are:

1. Whether the Court of Appeals erred in concluding that Respondent's capital sentences must be vacated on the ground that the District Court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard, or seen about Respondent's case.

2. Whether the District Court committed reversible error at the penalty phase of Respondent's trial by excluding evidence that Respondent's older brother, and fellow participant in the events at issue here, was allegedly involved in different crimes two years before the offenses for which Respondent was convicted.

III. DIVISION OF THE ARGUMENT:

A. Petitioner (Government): The Court of Appeals should be reversed.

1. First Petitioner's counsel: The district court judge did not err in refusing to pose content specific questions to all potential jurors. Voir dire elicited sufficient information about the potential jurors' exposure to pretrial publicity about the case. Content specific questions in the jury questionnaire and during the oral portion of voir dire would have led to an unmanageable volume of data and could have accidentally created bias where none previously existed. Most important, because the United States Supreme Court held in *Mu'Min v. Virginia*, 500 U.S. 415 (1991) that content specific questioning is not *constitutionally* required, the Court of Appeals was wrong to follow its pre-*Mu'Min* decision, *Patriarca v. United States*, 402 F.2d 314, 318 (14th Cir. 1968), and use its *supervisory powers* to require such questioning.

2. Second Petitioner's counsel: The district court judge did not abuse his discretion is excluding evidence of Green's involvement in the Taupeville murders. The evidence was not relevant mitigation evidence because nothing suggests Green's alleged commission of the Taupeville crimes had any link to Blue's commission of the Yellowville crimes. And even if the Taupeville evidence had some slight relevance, the judge rightly excluded it because the risks of confusing the issues and misleading the jury outweighed any probative worth. Any error by the trial court judge was harmless beyond a reasonable doubt because overwhelming evidence showed Blue willingly engaged in the crimes charged here. Finally, the undisclosed information simply was not discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963).

B. Respondent (Blue): The Court of Appeals opinion is right.

1. **First Respondent's counsel**: The trial court judge committed reversible error by refusing to ask content specific questions of all potential jurors. The *Patriarca* standard is key. Decisions about prospective jurors' impartiality are for the judge, not for the potential jurors themselves. Jurors – even those who say they can be impartial – may intentionally or unintentionally be harboring a bias based on pretrial publicity. By failing to ask what pretrial publicity jurors viewed, heard, and remembered, the judge had an insufficient basis to draw an informed conclusion about the jurors' actual potential for impartiality. In effect, he shifted that the decision about impartiality to the jurors themselves. The government's arguments about unmanageable data and accidental creation of bias are unavailing. And the government's *Mu'Min* based argument is seriously flawed. That case arose on direct review of a state-court criminal conviction — which meant the Supreme Court's was limited to enforcing the commands of the federal constitution. But Blue's trial was in federal district court and was subject to the supervisory power of the federal appellate courts, which extends beyond enforcing that which is constitutionally mandated.

2. **Second Respondent's counsel:** The district court judge abused his discretion (and committed reversible error) when he excluded the Taupeville murder evidence. Excluding the evidence violated Blue's right to present a complete mitigation defense by keeping from the jury major proof of Green's brutal past, his ability to enlist others in acts of extreme cruelty, and thus his relative culpability — an error the government exploited by distorting Green's character and suggesting no evidence showed his influence over Blue. The judge also violated Blue's *Brady* rights by refusing to give the defense a 302 report and recordings of Aqua's confession — evidence that, "if presented," would have shown "why Green was to be feared, and his ability to influence others to commit horrific crimes."

C. Special Note for Fall 2021: The problem is composed solely of a majority opinion with two distinct parts. THERE IS NO DISSENT. However, there is ample information in the majority opinion for the Government to formulate very strong arguments. We urge you to do the following: (1) read the **ENTIRE** problem once before you try to formulate any arguments; (2) read the portion of the problem that you will be arguing again, and as you do, formulate arguments for the Government/Petitioner through notes, highlighting, or whatever works best for you; (3) read your section a third time, using the same process to formulate arguments for Blue/Respondent. BE SURE YOU CAREFULLY READ ALL OF THE FOOTNOTES. The footnotes are full of helpful definitions and extra bits of law and fact that will be important to your arguments.

IV. OUTSIDE RESEARCH:

A. ***Outside research is NOT required. It is entirely optional.*** Time is much better spent on understanding and refining the arguments presented than on doing outside research. Suppress, if you can, the desire to find the "gotcha" or killer authority, statistic, or quotation. There's plenty of "ammunition" for the arguments in the two opinions you have.

B. The problem is based on *United States v. Tsarnaev*, 968 F.3d 24 (1st Cir. 2020), the Boston Marathon case. United States Supreme Court has granted certiorari and will hear oral argument in the matter on October 13, 2021.

V. ORAL ARGUMENT PROCEDURE:

- You will argue before a panel of three judges, usually made up of a mixture of practicing attorneys, professors, and judges who have had moot court, trial, and appellate experience.

- Staple your argument into a manila folder. It is NOT a crutch. DO NOT READ FROM IT VERBATIM. Use it for reference and to keep your place in your argument. Your folder should contain relevant facts, summaries of legal authorities or concepts, and other pertinent information.

- When you enter the room, put your name and the side you will be arguing on the blackboard. If you are in a "courtroom" without a blackboard, the judges will ask your name and the respective side you are arguing and will write it on their evaluation sheets.

- The Petitioner (here the U.S. Government) always argues first. When the judges ask if you are ready to proceed, respond "Yes, Your Honor."

- The introduction both sides should use is "May it please the Court. My name is _____, and I represent _____, the [Petitioner or Respondent] in this appeal." The Petitioner is allowed rebuttal and MUST reserve rebuttal time. You ask for rebuttal immediately after your introduction. "At this time, I would like to reserve (1 to 3) minutes of my time for rebuttal."

- You will be timed by one of the three (3) judges. The timekeeper will remind you how much time you have left. EACH person gets ten minutes. This may sound like an eternity, but it will go by quickly once you get into your argument. You will get a "5 minutes" left signal card, and "2 minutes" left signal card, and "1 minute" left signal card and a STOP card.

- When the STOP card is flashed, it means STOP regardless of where you are in your argument, but don't stop mid-sentence. The best way to handle this is to say, "I see my time has expired. May I have a moment to conclude?" The judge will then grant you additional time quickly to finish your thought and cut to your prayer. More about the prayer later.

- Pay respect to the Court. Be deferential, but assert your client's position. Never interrupt a judge – let him/her get the question out before you answer. Listen carefully to the question to ensure you are really answering it. Never get mad at a judge or be argumentative – be respectful and assertive. Converse with the judges – don't run over them with a truck and call it advocacy!

- Refer to each of the judges – regardless of gender, profession in the non-moot-court world, or age – as "your Honor" or "Justice (fill in the individual's last name)."

- DON'T talk too fast. Speak clearly and in a moderate tone of voice. Don't dance behind the lectern. It is distracting, unprofessional and makes you appear nervous and tentative. Appear confident and collected (even if you don't feel it). Be calm and alert – you'll be amazed with how much it will enhance your argument. Dress appropriately. Conservative, dark suit and tie.

VI. PREPARING A SUCCESSFUL ARGUMENT:

- An oral argument has three parts – the introduction, the body of the argument, and the prayer.

- The Petitioner must briefly state the RELEVANT facts of the case which should only last about one to two minutes. They must be fair, but they can be slanted toward your theory of the case. Don't give facts not contained in the record. DO NOT BE SURPRISED IF A JUDGE ASKS A QUESTION BEFORE YOU GET THROUGH YOUR FACTS. IF IT HAPPENS, ANSWER AND MOVE ON WITH THE ARGUMENT. Your focus should, however, be on the APPLICATION OF THE LAW TO THE FACTS. **Special tip for Fall 2021:** the issues in this case involve some overlapping facts and some facts distinct to each issue; the first Petitioner's advocate should not talk about the Taupeville murders. Instead, each advocate should focus on the facts most important to his argument.

- The Respondent should do one of the following: (1) accept the Petitioner's statement of the facts; (2) make corrections in the Petitioner's statement of facts; (3) clarify or point out any ambiguity in the Petitioner's statement of the facts; or (4) make any necessary additions to the Petitioner's statement of the facts. Take issue with the facts to suit your theory of the case. Be brief! DON'T ARGUE THE FACTS: ARGUE THE LAW! That said, this case demands that all litigants have an excellent command of the relevant facts to make the most effective arguments.

- Road map your argument. State the issues for the court to consider in clear, concise terms. For example: "There are three reasons our client should prevail. First, . . ." BE PERSUASIVE. That is the whole object of an appellate argument. Tell the Court <u>why</u> you should win. "The trial court erred in finding for the Respondent because…" or "the ruling of the trial court should be upheld because…" (The word "erred" is pronounced so that it rhymes with "bird").

- After you have "road mapped" your issues for argument, go back to point one and begin your analysis of each point/reason why you should win.

- The Prayer: Tell the Court in one sentence what you want them to do for your client. "We respectfully request that this Court reverse/affirm the Court of Appeal's decision." After your prayer, close your folder and sit down.

- For rebuttal, do not be verbose. Only one of Petitioner's attorneys gives a rebuttal. Your rebuttal should include one or two strong points. Listen to the Respondent's argument closely to pick up on what the judges are questioning him about. If it favors your side, hit it hard in your rebuttal. An example might be the correction of a case that the Respondent did not analyze or apply correctly. Rebuttal is very important because it is a great way to win points.

- EYE CONTACT IS VERY IMPORTANT! Look directly at the judges as much as possible. This will also help you appear confident in your argument and enhance your overall advocacy style.

- The most important thing to keep in mind is that you are very familiar with your case, and you know what you are talking about. The best way to avoid feeling nervous is to prepare your argument well, think clearly, and HAVE FUN!

- The judges will give you feedback after the entire argument, including rebuttal, is complete. These helpful hints and comments will be invaluable in the next round.

VII. WHY SO MANY QUESTIONS?

- The judges will ask EVERYONE questions about the case. The purpose is not to humiliate or confuse you. To the contrary, the judges need your help in figuring out how to decide this case. That is why they ask questions. Also, in a moot court competition, they want to determine how well you know your material, how well you can think on your feet, and how well you respond and return to the flow of your argument.

- Anticipate what questions might be and prepare to respond to them. BUT don't try to write out answers and read them back. Answer the question briefly, and then get back into your argument. Remember, YOU control the flow of your argument as much as possible, so don't open yourself up to distractions and interruptions by silently fumbling around trying to figure out what to say next.

- Remember to listen to EACH question before you answer it. It may not be as difficult as you think. If you do not hear or do not understand what a judge is asking, it is acceptable to ask him/her to repeat the question so long as you do so politely and on a limited basis.